Supreme Court, U.S.
FILED

961602 APR 1 1997

OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

William L. Lutz, Esquire
Counsel of Record
Hugh T. Brower
Martin, Lutz & Brower, P.C.
2100 N. Main, Ste. 3
P. O. Drawer 1837
Las Cruces, New Mexico
88004-1837
(505) 526-2449

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED FOR REVIEW

The question presented by this petition are:

1. An investigator for a state District Attorney's Office, who is a certified law enforcement officer, should not have absolute prosecutorial immunity under 42 U.S.C. §1983 for material false statements under oath in securing an arrest warrant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE GRANTED	5
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Burns v. Reed, 500 U.S. 478 (1990) 5, 9

Butz v. Economou, 438 U.S. 478 (1978) 5, 6

Cleavinger v. Saxner, 474 U.S. 193 (1985) 5

Fletcher v. Kalina, 93 F.3d 653 (9th Cir. 1996) 5, 7

Imbler v. Pachtman, 424 U.S. 409 (1976) 7, 9

Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986) 5, 6

Malley v. Briggs, 475 U.S. 335 (1986) 5, 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5, 6, 7

Pierson v. Ray, 386 U.S. 547 (1967) 5, 6

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1343(3) 2

42 U.S.C. § 1983 ..... 1, 2, 5

NEW MEXICO RULES

SCRA 1986, Rule 5-201 10

SCRA 1986, Rule 9-201 10

SCRA 1986, Rule 9-202 10

SCRA 1986, Rule 9-203 10

SCRA 1986, Rule 9-204 10

SCRA 1986, Rule 16-307 10

PETITION FOR WRIT OF CERTIORARI

The petitioner, Susan Lynn Roberts, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 6, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix App. 1 through 16 to this petition and is published at 104 F.3d 316 (10th Cir. 1997).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on January 6, 1997. The opinion was issued as a mandate on January 6, 1997. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires an interpretation in applying 42 U.S.C. §1983 which provides as follows:

> Every person who, under color of any statute, ordinances, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Suit was commenced, pursuant to 42 U.S.C. §1983, by Susan Lynn Roberts to the United States District Court for the District of New Mexico, alleging a violation of her civil rights by Charles Timothy Kling. The basis for federal jurisdiction in the district court was 28 U.S.C. §1343(3). The district court entered summary judgment holding Charles Timothy Kling was immune from suit under 42 U.S.C. §1983. Susan Lynn Roberts appealed to the United States Court of Appeals for the Tenth Circuit which held that Charles Timothy Kling was absolutely immune since he worked for the District Attorney's Office of Dona Ana County, New Mexico.

B. The Facts Material to the Questions Presented.

Susan Lynn Roberts had summer visitation rights with her two children. In the summer of 1992, the children were delivered to her in El Paso, Texas. She took the

children to the State of Oregon. In August, 1992, she and her ex-husband disagreed as to the date the children were to be returned. Susan Lynn Roberts' ex-husband lived in New Mexico near the Texas state line. The divorce had been granted in New Mexico. Susan Lynn Roberts did not return the children to her ex-husband by the date he contended they were to be returned. Charles Timothy Kling, a certified law enforcement officer who worked as an investigator for the District Attorney's Office of Dona Ana County, was requested by the District Attorney to investigate a complaint made by Susan Lynn Robert's ex-husband and his attorney. After an investigation, Charles Timothy Kling was the affiant to a complaint in State Magistrate Court in Dona Ana County, New Mexico to secure an arrest warrant. In this complaint, Charles Timothy Kling stated under oath that the crime, which was the subject of his affidavit, had occurred in New Mexico on or about August 17, 1992.

At the time of the making of this affidavit, Charles Timothy Kling knew that Susan Lynn Roberts had been in the State of Oregon on or about this date and was not in the State of New Mexico. Also, at the time of the making of this affidavit, Kling knew that there was a dispute as to the time the children were supposed to be returned to the ex-husband. On the face of the decree in the divorce, the children did not have to be returned until after August 17, 1992. Later, in 1992, the judge granting the divorce interpreted the decree that the children should have been returned around August 17, 1992.

As a result of this false complaint, a federal fugitive warrant was secured by the FBI against Susan Lynn Roberts falsely claiming that she had fled the State of

New Mexico to avoid prosecution. She had not been in New Mexico in August and had not fled New Mexico. She was arrested on the federal warrant and the New Mexico state warrant and jailed in Oregon on or about November 24, 1992. Shortly after the birth of her youngest child, Susan Lynn Roberts was transported to the State of New Mexico on these charges, and jailed again for approximately a month.

Her public defender filed a motion to dismiss since no crime had taken place in New Mexico. The state district judge in the criminal proceeding agreed that no crime had occurred in New Mexico and dismissed the case. The State of New Mexico appealed this decision to the New Mexico Court of Appeals. The New Mexico Court of Appeals in an unpublished decision summarily affirmed the decision of the New Mexico District Court stating:

> There was no evidence that Mother was in New Mexico when she failed to return the children.

(Unpublished Memorandum Opinion filed November 15, 1993, in the Court of Appeals of the State of New Mexico).

The false factual allegations in the complaint by Charles Timothy Kling, which were also relied upon by the Federal Bureau of Investigation (FBI) in filing the complaint under 18 U.S.C. §1073, were the primary basis of Susan Lynn Roberts' suit below.

REASONS WHY THE WRIT SHOULD BE GRANTED

The question of the extent of absolute immunity of state and federal law enforcement officials has been an issue of disagreement by many courts. This Court has written numerous decisions concerning the issue of qualified immunity and absolute immunity as to both law enforcement officers and attorneys in prosecutor's offices. Traditionally, this Court has held that persons, in performing an investigative function prior to filing of a formal information or indictment, have only qualified immunity. Yet, in this case, the Tenth Circuit held that an investigator, who was a certified law enforcement officer in the State of New Mexico, and who made a material false statement under oath to secure an arrest warrant, had absolute prosecutorial immunity.

The decision of the Tenth Circuit conflicts with numerous decisions of this Court on immunity of state officials under 42 U.S.C. §1983 and federal officers, including *Pierson v. Ray*, 386 U.S. 547 (1967); *Butz v. Economou*, 438 U.S. 478 (1978); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); and *Burns v. Reed*, 500 U.S. 478 (1990).

The Tenth Circuit recognized that there was a conflict in the circuits on this issue. 104 F.3d at 320, Footnote 5. The decision of the Tenth Circuit conflicts with the decision of the Ninth Circuit with *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996) and *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986). In *Fletcher*, the Ninth Circuit held that a prosecutor who prepared an application for an arrest

warrant had only qualified immunity in preparing a declaration in support of an arrest warrant. In *Joseph*, the Sixth Circuit held that investigators for a district attorney's office had only qualified immunity in connection with a search warrant while the prosecutor had absolute immunity. This Court should resolve these conflicts in the circuits and should insure that its decisions above cited are consistently followed by the circuits.

This Court, years ago, recognized that police officers performing an arrest function had only qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). In *Butz v. Economou*, 438 U.S. 478 (1978), the Court dealt with the distinction between absolute and qualified immunity on the liability of federal officials. The Court adopted the rule which generally has been applied in §1983 cases as to liability of state officials. The Court has recognized judges, legislators and prosecutors were given absolute immunity. Other actions of public officials were given qualified immunity.

In such cases as *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that the function the public employee was performing, which gives rise to the claim of liability, determines whether the employee has qualified or absolute immunity. In that case, the attorney general was sued in connection with national security wire taps. The question was whether the attorney general had absolute immunity as a prosecutor or only qualified immunity as a law enforcement officer. In deciding whether officials performing particular functions are entitled to absolute immunity, the Court has generally looked at historical or common law basis for the immunity in question. There was no historical or common law basis

for absolute immunity for officers carrying out tasks essential to national security. Second, the performance of the national security function did not subject the official to the same risk of litigation as did carrying out judicial tasks. Third, officials who were entitled to absolute immunity were generally subject to other checks which helped to prevent abuses in authority from going unaddressed, such as legislators being accountable to their constituents. 472 U.S. at 521-522. None of these criteria applied to the attorney general in connection with the authorization of an illegal wire tap to give rise to absolute immunity.

This Court in *Malley v. Briggs*, 475 U.S. 335 (1986), held that state police officers who request a warrant which causes an unconstitutional arrest are only entitled to qualified immunity under §1983. The defendant in *Malley* was the person who drew up the complaint and was the affiant on the complaint to get an arrest warrant. As a result of this complaint, a judge issued a warrant. The Court held that state officers who seek absolute exemption from personal liability bear the burden of showing public policy requires such an exemption. The defendant argued before this Court that the petitioner should be absolutely immune similar to a complaining witness. This Court noted that a complaining witness was not absolutely immune in common law.

> In *Imbler, supra,* we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." Id., at 437, 47 L.Ed.2d 128,

> 96 S.Ct. 984. We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue.

at page 279.

This Court stated that a police officer applying for a warrant, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. In conclusion, this Court found,

> In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity.

at page 280.

This decision is in direct conflict with the decision of the Tenth Circuit in this case.

Here, the investigator for the District Attorney's Office was seeking an arrest warrant as an investigator. This was not an information nor an indictment. Kling was a law enforcement officer, not an attorney prosecutor. The mere fact that an assistant district attorney reviewed the affidavit does not change Kling's status from qualified immunity to absolute prosecutorial immunity. Kling knew that Susan Roberts had not been in New Mexico on or about the date alleged in the complaint. Yet, he submitted a sworn complaint and affidavit to secure an arrest warrant that falsely stated that Susan Lynn Roberts' actions had occurred in the State of New Mexico.

This was a fact, which both under New Mexico law and federal law, had to be determined ultimately by a

jury after an information or indictment were filed. Yet, in this case, it is undisputed this allegation is false. Once brought to the attention of the state district court the case was dismissed. The Court of Appeals of the State of New Mexico summarily affirmed the dismissal since no actions of Susan Roberts had taken place in the State of New Mexico.

This is not the situation of a witness at a trial, a witness before a grand jury, or a prosecutor knowingly submitting third-party false testimony at trial, such as occurred in *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Tenth Circuit failed to consider that it is not the office for which one works, but the actual function that one is performing at the time of the actions which give rise to the type of immunity. An attorney, even a prosecutor, who is only giving advice, does not have absolute immunity. Such a prosecutor only has qualified immunity. *See, Burns v. Reed*, 500 U.S. 478 (1991).

The judicial system, in protecting a citizen's rights, must have truthful information given to Magistrates by law enforcement officers to secure search and arrest warrants. An investigator should not have absolute immunity for material false statements. The system is only as good as the information that law enforcement officers provide to the Magistrate. Traditionally, at common law, when false statements were made in connection with a complaint to secure an arrest warrant, there has been liability.

As law enforcement agencies and prosecutorial offices have grown, functions have become blurred. Many district attorney offices have large staffs of investigators who perform a police function of investigating cases.

Kling, in this case, performed such a function. He investigated the facts and submitted an affidavit and sworn criminal complaint to a local Magistrate in Dona Ana County, New Mexico. Under New Mexico law, an indictment or an information is the charging document and must be signed by the district attorney. SCRA 1986, Rule 5-201. The form of criminal complaints are in the New Mexico rules at SCRA 1986, Rules 9-201 and 9-202. As shown in the note to Rule 9-201, the district attorney must approve waiver of the filing fee. The information and indictment must both be signed by the district attorney. SCRA 1986, Rules 9-203 and 9-204. Prosecutorial immunity of an Assistant District Attorney comes at the initiation of the formal charges through information or indictment of any type. An investigative officer who files a false affidavit to secure an arrest warrant does not retain prosecutorial immunity. In fact, New Mexico, like many states, recognizes it is inappropriate for an attorney in a case to act as a witness. SCRA 1986, Rule 16-307.

The Tenth Circuit in this case, while stating it was following a functional test, in fact, did not. It held, if the proceeding involved a judicial matter by an employee of the District Attorney's Office, there was absolute immunity for that person.

This is an important issue for the Court. The Court must balance the rights of citizens to be free from false arrest and imprisonment and the important law enforcement functions of bringing to justice those who commit crimes. In determining that line, the prior functional test to view traditional immunity is appropriate. In applying that test, this Court should review its prior decisions and determine that immunity is not based upon the status of

being an employee for the District Attorney's Office. Rather, immunity is to be determined by the actions taken by the individual and the stage of the process in which that action is taken.

This case is important to clarify the rule of absolute immunity. An important goal in a fair society is to protect citizens from false arrest. A society cannot be free if its citizens are subject to false arrest and those making the false statements to secure the arrest have absolute immunity. Citizens of this country should be able to seek redress for false arrest. Mere dismissal is not proper redress. Congress has long ago determined that citizens have a right to be protected against constitutional abuses of state officers. Our system of law enforcement is only as good as the people who enforce it. If they make false statements to secure an arrest warrant, there must be an action to protect those wrongfully arrested.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN, LUTZ & BROWER, P.C.

WILLIAM L. LUTZ
Counsel of Record
HUGH T. BROWER
Attorneys for Petitioner
2100 N. Main, Ste. 3
P. O. Drawer 1837
Las Cruces, NM 88004
(505) 526-2449

No. 97-___

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TABLE OF CONTENTS

Page

APPENDIX A

United States Court of Appeals for the Tenth Circuit, Opinion Filed January 6, 1997 .....App. 1

APPENDIX B

Judgment entered January 6, 1997, Issued as Mandate on January 28, 1997 .....App. 15

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant, v. CHARLES TIMOTHY KLING, Defendant-Appellee.	)	No. 95-2272 (Filed Jan. 6, 1997)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV-94-1318-LH)

Submitted on the briefs:

William L. Lutz and Hugh T. Brower of Martin, Lutz & Brower, P.C., Las Cruces, New Mexico, for Plaintiff-Appellant.

Mark D. Jarmie of Sharp, Jarmie, & Scholl P.A., Albuquerque, New Mexico, for Defendant-Appellee.

Before PORFILIO, ALARCON,* and LUCERO, Circuit Judges.

---

* Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

PORFILIO, Circuit Judge.

I. INTRODUCTION

Plaintiff Susan Lynn Roberts appeals from the district court's grant of summary judgment to defendant on her civil rights complaint, filed pursuant to 42 U.S.C. § 1983. She challenges as legal error the district court's grant of absolute immunity, and alternatively, qualified immunity, to defendant. We have jurisdiction over this appeal under 28 U.S.C. § 1291.[1] Our review of the district court's summary judgment decision is de novo, applying the same legal standards as those employed by the district court to determine whether a genuine issue of material fact precludes summary judgment, and, if not, whether the moving party is entitled to judgment as a matter of law. *See Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995).

The underlying facts are undisputed. Defendant, then an investigator for the District Attorney's office in the Third Judicial District of New Mexico, investigated allegations that plaintiff had failed to return her children to the custody of their father in violation of a court order. Defendant subsequently signed and filed a criminal complaint against plaintiff before a magistrate in Dona Ana

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

County, New Mexico, and obtained a warrant for plaintiff's arrest. Plaintiff was arrested in Oregon and extradited to New Mexico for trial. Five months after her preliminary hearing, plaintiff moved to dismiss the charges against her on jurisdictional grounds. The state trial judge dismissed the case and his decision was affirmed on appeal. In her civil rights complaint against defendant, plaintiff contended, in relevant part, that defendant knowingly and willfully executed the criminal complaint based on false and misleading factual allegations, resulting in the issuance of a warrant for her arrest.[2]

Defendant contended he was immune from plaintiff's suit, and the district court agreed. The district court concluded that defendant was entitled to absolute prosecutorial immunity, holding that defendant's actions in swearing out a complaint and seeking an arrest warrant were "functionally initiating a criminal prosecution." Appellant's App. at 81. Further, the court held that defendant was also entitled to qualified immunity. *See id.* at 89.

---

[2] Plaintiff also alleged in her complaint that defendant violated her constitutional rights by 1) providing false information to the Federal Bureau of Investigation, leading to a federal warrant for her arrest, 2) issuing publicity containing false statements about plaintiff, and 3) making false statements to the media. However, on appeal she does not challenge the district court's resolution of these allegations in defendant's favor. Accordingly, she has waived appellate review of those issues. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

II. ABSOLUTE IMMUNITY

A.

Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Under the "functional approach" adopted by the Supreme Court, " 'we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.' " *Spielman v. Hildebrand*, 873 F.2d 1377, 1381 (10th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). In other words, absolute immunity " 'is justified and defined by the functions it protects and serves, not by the person to whom it attaches.' " *Mee v. Ortega*, 967 F.2d 423, 425 (10th Cir. 1992) (quoting *Forrester*, 484 U.S. at 227).

In *Imbler v. Pachtman*, the Supreme Court held that state prosecutors are entitled to absolute immunity from § 1983 suits for activities within the scope of their prosecutorial duties. 424 U.S. at 420. The Supreme Court defined the activities deserving of immunity as those "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and . . . presenting the State's case." *Id.* at 430-31. Similarly, this court has noted that the analysis of prosecutorial immunity is based on a continuum: "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that

absolute immunity will attach." *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994) (further quotation omitted).

" 'Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is "advocacy" because that is the prosecutor's main function and the one most akin to his quasi-judicial role.' " *Spielman*, 873 F.2d at 1382 (quoting *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) and citing *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988)); *see Gagan*, 35 F.3d at 1475; *Pfeirffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991). In contrast, when a prosecutor acts in an administrative or investigative capacity, those activities are entitled to qualified immunity only. *See England v. Hendricks*, 880 F.2d 281, 285 (10th Cir. 1989) (citing *Meade*, 841 F.2d at 1532).

The district court's decision that defendant is entitled to absolute immunity is a question of law which we review de novo. *See England*, 880 F.2d at 285. In this case, we think it is clear that defendant's actions in swearing out a complaint against plaintiff were prosecutorial in nature. He was initiating a judicial proceeding as part of the District Attorney's office.[3] *See Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir. 1990) (filing charges was act "within the continuum of initiating and presenting a criminal

---

[3] We note that although defendant was employed as an investigator, under the functional approach, we focus on the nature of his actions in this case. Defendant need not be a prosecutor to be afforded prosecutorial immunity; the immunity extends to those who perform equivalent functions. *See Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995) (employees of district attorney's office); *Pfeiffer*, 929 F.2d at 1489-90; *Meade*, 841 F.2d at 1532 n.18.

case"); *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983) ("filing a criminal complaint . . . was clearly an initiation of a prosecution").

B.

The Supreme Court has recognized that prosecutorial functions may also involve some activities preliminary to the initiation of an action, including actions away from the courtroom. *See Imbler*, 424 U.S. at 431 n.33. Because of their connection to the critical judicial role that a prosecutor plays, those activities are also afforded absolute immunity. *See Pfeiffer*, 929 F.2d at 1490 (immunity may attach to even administrative or investigative acts when necessary for a prosecutor to function as an officer of court).

The remaining question, then, is whether defendant's act of obtaining an arrest warrant was performed in his role as an advocate, *see England*, 880 F.2d at 285, or, in other words, whether his actions "constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity." *Spielman*, 873 F.2d at 1382. One factor, although not always dispositive, is whether the acts complained of were taken before or after a determination of probable cause. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 & n.5 (1993). Although plaintiff contends that issues of fact exist as to the District Attorney's decision regarding probable cause, it is clear that the Chief Deputy District Attorney signed the complaint before defendant performed any of the acts complained

of.[4] The District Attorney's undisputed testimony was that, in signing the complaint, the Chief Deputy District Attorney was approving the complaint "as it relates to probable cause." Appellant's App. at 131. Because defendant's actions followed a probable cause determination, they are more closely associated with the judicial process and the prosecutorial function of an advocate for the state.

Additionally, "[w]e have held that a critical factor for absolute prosecutorial immunity 'involves a prosecutor's acts as an advocate before a neutral magistrate.' " *Snell*, 920 F.2d at 693 (quoting *Lerwill*, 712 F.2d at 437). Plaintiff does not challenge defendant's investigation of the facts, only his conduct before the magistrate. In *Burns v. Reed*, 500 U.S. 478, 491-92 (1991), the Supreme Court held that a prosecutor's appearance and presentation of evidence before a judge to secure a search warrant was entitled to absolute immunity, concluding that the prosecutor was acting as advocate for the state and that immunity would serve the policy of protecting the " 'judicial phase of the criminal process.' " *Id.* at 492 (quoting *Imbler*, 424 U.S. at 430). Similarly, defendant's seeking an arrest warrant before a magistrate is associated with the judicial process.

Finally, the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is

---

[4] Defendant signed the criminal complaint as the complainant, and the Chief Deputy District Attorney signed in the "Approved" section, to indicate approval by the District Attorney's office. Appellant's App. at 145.

functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature. As this court stated in *Lerwill v. Joslin*:

> [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of Imbler. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under Imbler.

712 F.2d at 437-38.

This court has held that "a prosecutor's absolute immunity has extended to his procurement of an arrest warrant." *Lerwill*, 712 F.2d at 437.[5] We conclude that

---

[5] The Ninth Circuit has recently called *Lerwill* into question, noting that it was issued before current Supreme Court authority on the subject of prosecutorial immunity. *See Fletcher v. Kalina*, 93 F.3d 653, 656 n.3 (9th Cir. 1996). Other circuits continue to cite *Lerwill* as authority for the proposition that, in seeking an arrest warrant in connection with filing charges against a defendant, a prosecutor is functioning as an advocate for the state and is entitled to absolute immunity. *See Pinaud v. Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986). *See also Schrob v. Catterson*, 948 F.2d 1402, 1414 (3d Cir. 1991) (noting split of authority regarding absolute immunity "in the context of the prosecutorial decision to seek an arrest or search warrant,"). We reaffirm our position in *Lerwill* because, as discussed below, we conclude it is consistent with the more recent Supreme Court pronouncements.

defendant is entitled to absolute immunity for seeking an arrest warrant in connection with the charges being filed against plaintiff under the auspices of the District Attorney's office. It is clear from the record on appeal that the purpose of the warrant was to secure plaintiff's presence to defend against the criminal charges and, as a by-product, to find the children who had not been returned to their father. The warrant was not investigative or used as the means to find more information before deciding that the case should be prosecuted, but was sought at the same time the charges against plaintiff were filed. *See also Snell*, 920 F.2d at 693 ("a prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as . . . seeking an arrest warrant . . . ordinarily will be entitled to absolute immunity"); *Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (defendant properly claimed absolute immunity with regard to drafting and authorizing original criminal complaint and procuring arrest warrant).

C.

On appeal, as before the district court, plaintiff contends that the Supreme Court's opinion in *Malley v. Briggs*, 475 U.S. 335 (1986) is dispositive here. In *Malley*, the Supreme Court denied absolute immunity to a police officer who sought an arrest warrant following his investigation of the defendants. Plaintiff here asserts that, defendant, a certified law enforcement officer, should be denied absolute immunity because his acts were the same as those of the police officer in *Malley*.

We disagree. First, defendant's status as a certified law enforcement officer is irrelevant to the determination of whether his actions are entitled to immunity, under the functional approach.[6] Second, while defendant's acts in swearing out a complaint and obtaining a warrant for plaintiff's arrest are closely similar to the acts which afforded the defendant only qualified immunity in *Malley*, the acts themselves are not the focus of the functional approach. Instead, we examine the function a defendant's acts serve. *See Imbler*, 424 U.S. at 430 (approving Court of Appeals' focus on "the functional nature of the activities"); *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987) (looking to "the nature or function of the ultimate act" in determining entitlement to prosecutorial immunity); *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987) (analyzing immunity on "functional basis").

We are mindful of case law reasoning that different actors performing the same acts should receive the same level of immunity. *See, e.g., Fletcher*, 93 F.3d at 655-56. Nonetheless, we think that the proper focus is on the function an act serves, not the act itself. Further, we think

---

[6] Plaintiff contends on appeal that the district court ignored the functional test when, in distinguishing *Malley* from the present case, it commented that defendant was not a police officer. Then, in an interesting reverse, plaintiff appears to argue that defendant's status as a certified law enforcement officer is a factor in favor of applying *Malley*. Appellant's Br. at 19. We think plaintiff's argument misses the mark. Here, the district court noted that plaintiff "was not a police officer capable of depriving people of valuable rights," but worked directly for the district attorney. The court then summarized defendant's actions in this case. The court's analysis clearly did not ignore the functional approach, but applied it.

Supreme Court authority supports this analysis. In *Buckley*, the Court's opinion indicates that the act of interviewing witnesses may or may not be entitled to absolute immunity, depending on the role of the actor: "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause." 509 U.S. at 273.[7] In *Malley* itself, the Supreme Court recognized the distinction between function and conduct, finding unpersuasive the proposed analogy between a police office seeking an arrest warrant and a prosecutor seeking an indictment. 475 U.S. at 342-44. The policy considerations underlying a grant of immunity focus on the function or role an individual fulfills in performing certain acts, not on the acts alone. "We have

---

[7] A majority of cases applying the same act/same immunity analysis cite to *Buckley* as authority. *See, e.g., Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 (1st Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1252 (3d Cir. 1994). In *Buckley*, the Court, quoting the Seventh Circuit, used "same act" language in a discussion of the various functions that a prosecutor performs. 509 U.S. at 273. However, the opinion as a whole reflects an emphasis on function, not conduct alone. Other cases cite to the Supreme Court's opinion in *Burns* as support for this kind of analysis, *see Schrob*, 948 F.2d at 1415 n.12. However, the *Burns* court did not compare like acts in its analysis. The Court noted: "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for *following the advice*." 500 U.S. at 494 (emphasis added). The opinion goes on to reject arguments that the act of giving advice to the police was part of the prosecutorial capacity or closely associated with the judicial process. *Id.* at 495-96. We conclude that neither *Buckley* nor *Burns* is contrary to our reasoning here.

interpreted § 1983 to give absolute immunity to functions 'intimately associated with the judicial phase of the criminal process,' not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342 (quoting *Imbler*, 424 U.S. at 430).

III. SUMMARY JUDGMENT

Plaintiff also contends that the district court erred when it ignored genuine issues of material fact which preclude summary judgment on the basis of absolute immunity. She takes issue with the district court's statements that the District Attorney had concluded that probable cause existed to believe plaintiff had violated the applicable statute and that a criminal complaint should be filed. To support her contention that these matters are genuinely disputed, she cites to the District Attorney's deposition. She contends that he testified he did not make a determination that probable cause existed, but determined only that defendant should investigate further, and he did not instruct defendant to obtain a warrant for plaintiff's arrest. Therefore, she argues, there is factual dispute "as to whether [defendant] was functionally initiating a criminal prosecution." Appellant's Br. at 21.

A careful review of the deposition testimony leads us to conclude that plaintiff's arguments on this point have no merit. The District Attorney did, indeed, state that he sent defendant to investigate whether probable cause existed as to each essential element, *see* Appellant's App.

at 131, 138, and that he had not authorized the filing of a criminal complaint before defendant investigated the relevant facts, *see id.* at 133. However, he also testified that if defendant's investigation corroborated the facts as preliminarily reported, then there was probable cause to believe a crime had been committed. *See id.* at 140. Specifically, he said: "In speaking with [defendant], I instructed him to do the investigation, sign whatever his investigation revealed, and if they were consistent with what information was given to me [ ], that would be probable cause to go forward." *Id.* He also testified that the information in the Statement of Facts prepared by defendant was consistent with the information as preliminarily reported, and that the Chief Deputy District Attorney, "in signing the criminal complaint, determined, based on his own experience, that there were sufficient facts alleged to constitute probable cause to file a criminal complaint." *Id.*

While the District Attorney did not make an actual probable cause determination before defendant's investigation, once the reported facts were verified by defendant's investigation, both he and the Chief Deputy District Attorney believed that probable cause existed to go forward with a criminal complaint. Therefore it is undisputed that defendant's actions in seeking an arrest warrant and swearing out a complaint followed a determination of probable cause within the District Attorney's office.

IV. CONCLUSION

Because we conclude that defendant is entitled to absolute prosecutorial immunity under the facts of this case, we need not address plaintiff's arguments regarding the district court's alternative holding that defendant would be entitled to qualified immunity. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff - Appellant, v. CHARLES TIMOTHY KLING, Defendant - Appellee.	)))))))	No. 95-2272 (D.C. No. CIV-94-1318-LH)

JUDGMENT
Entered January 6, 1997

Before PORFILIO, ALARCON,* and LUCERO, Circuit Judges.

---

*Honorable Arthur L. Alarcon, Senior circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ Audry F. Weigel
Deputy Clerk

(SEAL)
CERTIFIED a True Copy of
the original filed in my office.
Robert M. March, Clerk

by /s/ Rebecca Chavez Lutz
Deputy

FILED

961602 APR 1 1997

OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William L. Lutz, Esquire
Counsel of Record
Hugh T. Brower
Martin, Lutz & Brower, P.C.
2100 N. Main, Ste. 3
P. O. Drawer 1837
Las Cruces, New Mexico
88004-1837
(505) 526-2449

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	
-vs-	)	No. CIV 94-1318 LH/WWD
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

ORDER

(Filed Nov. 08, 1995)

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment (Docket No. 22). A memorandum opinion was entered on this date. For the reasons set forth therein, the Court **FINDS** that Defendant's Motion for Summary Judgment is well taken and will be **GRANTED**.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment **IS GRANTED** and this case **IS DISMISSED** with prejudice.

/s/ LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	No. CIV 94-1318 LH/WWD
-vs-	)	
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Nov. 08, 1995)

THIS MATTER came on for a hearing before the Court on August 17, 1995, on Defendant's Motion for Summary Judgment (Docket No. 22). The Court, having reviewed the submissions and arguments of the parties, finds that Defendant's Motion for Summary Judgment is well taken and should be granted.

Plaintiff brought this 42 U.S.C. § 1983 action in federal court alleging violations of her Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights stemming from the defendant allegedly filing a false and erroneous criminal complaint against her. The core of Plaintiff's claims against Defendant is that Defendant knowingly, or with reckless disregard, made material misrepresentations or omissions in swearing out a complaint for the arrest of Plaintiff. Plaintiff argues that Defendant could

not reasonably believe Plaintiff could be subject to jurisdiction for violating New Mexico's Custodial Interference statute[1] and that he failed to apprise the magistrate of this failure of jurisdiction. She contends that these misrepresentations or omissions resulted in the issuance of an arrest warrant and subsequent arrest and extradition of Plaintiff from Oregon for violating New Mexico's Custodial Interference statute. The criminal complaint against Plaintiff was eventually dismissed by the trial court for lack of jurisdiction. The New Mexico Court of appeals affirmed the trial court's dismissal.[2]

Defendant has moved for summary sudgment [sic] on the basis of both absolute immunity and qualified immunity.

Standard for Summary Judgment

A summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). On review, the party opposing summary judgment benefits from all reasonable doubts in

---

[1] NMSA 1978, § 30-4-4(B) (Cum. Supp. 1993). The statute provides as follows:

> B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

[2] *New Mexico v. Roberts*, No. 14,976 (N.M. Ct. App. 1993).

determining whether a genuine material factual issue exists. *Id.* at 321-323.

Background

The material facts relevant to the issues in this case are not in dispute. Plaintiff is the mother of two children from a now terminated marriage to Mr. Ronald Roberts. On July 9, 1992, Plaintiff came to New Mexico, Dona Ana County, and signed a Parenting Plan, which was incorporated by reference into the Final Custody Order filed in their divorce case on July 21, 1992, in the Third Judicial District Court in Dona Ana County. Under the provisions of this Plan and Order, Mr. Roberts retained primary physical custody in New Mexico of the two children and Plaintiff was granted delineated visitation privileges, including the right to a six-week visitation period each summer. After executing the plan in Dona Ana County on July 9, 1992, Plaintiff requested that Mr. Roberts deliver the children to Plaintiff's hotel room in El Paso, Texas. Plaintiff then took the children with her to her home in Oregon for a planned six-week visit. There is a dispute in the record as to when the parents had agreed that the children would be returned to New Mexico. Mr. Roberts alleges that they agreed to have the children back in New Mexico two days prior to the commencement of school, or August 17, 1992. Six weeks from July 9, 1992, however, would be August 20, 1992. As will be explained below, this fact is not material to the issues before the Court.

Mr. Roberts contacted Plaintiff on August 16, 1992, to determine the details associated with his children's return to New Mexico. Plaintiff informed Mr. Roberts that

she had until August 20 to return the children, but that in any event, she intended to keep them with her in Oregon and to enroll them in a local school. Mr. Roberts then contacted his divorce attorney, Jerald A. Valentine, and informed him of the conversation he had with Plaintiff. Mr. Valentine contacted Steven Stevers, Plaintiff's divorce attorney, and informed him of Plaintiff's stated intent not to return the children. After discussions with Plaintiff, Mr. Stevers subsequently contacted Mr. Valentine and informed him that the children would be returned to New Mexico on August 21, 1992, and relayed the associated flight information. Mr. Roberts met the designated flight at the airport on August 21, 1992, however, the children were not on the plane.

Mr. Roberts then contacted Michael Sheehy, an attorney in Tualatin, Oregon, in order to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Plaintiff. After attempted service of the warrant on August 21, 1992, Mr. Sheehy informed Mr. Roberts that the deputy sheriff was told that Plaintiff had vacated her last known address and had taken the children to Alaska.

Mr. Valentine contacted Third Judicial District Attorney Douglas Driggers and informed him of the undisputed facts outlined above, with the exception of the fact that the children were delivered to the Plaintiff's El Paso, Texas hotel room on July 9, 1992. After examining New Mexico's Custodial Interference statute and based on his discussions with Mr. Valentine, District Attorney Driggers concluded that the statute had been violated, that there was probable cause to believe that each and every

element of custodial interference had been committed, and that a criminal complaint should be filed. District Attorney Driggers then instructed Defendant to meet with Mr. Roberts on August 21 and verify the information relayed to him by Mr. Valentine and to obtain relevant documents. District Attorney Driggers also instructed Defendant to then sign and file a criminal complaint, as prepared and approved by an assistant district attorney, and to obtain a warrant for the arrest of Plaintiff.

Defendant met with both Mr. Valentine and Mr. Roberts and obtained verification of the facts relayed by Mr. Valentine to District Attorney Driggers. In addition, Defendant obtained copies of the Final Custody Order and the executed Parenting Plan. Based on this information, Defendant swore out a criminal complaint before a Magistrate Judge in the Magistrate court of Dona Ana County. The criminal complaint included a Statement of Facts outlining the information given him by Mr. Roberts and was prepared and approved by Alfred J. Perez, Chief Deputy District Attorney. The magistrate judge found that probable cause existed and subsequently issued a warrant for Plaintiff's arrest.

Plaintiff was arrested in Oregon on November 24, 1992, still in possession of the two children and having had no further contact with Ronald Roberts after the August 16 telephone conversation. Plaintiff was extradited to New Mexico on February 4, 1993. At a February 15, 1993 preliminary hearing, Judge Maynez found probable cause for the charges and a criminal information was filed on February 17, 1993. Plaintiff was present at the Preliminary Hearing and was represented by Assistant Public Defender Samuel Z. Damon. Mr. Damon filed a

motion to dismiss based on lack of jurisdiction in July, 1992, nearly five months after Plaintiff's Preliminary Hearing. District Judge Beal granted Plaintiff's motion to dismiss and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Plaintiff argues that Defendant falsely swore that the violation of the Custodial Interference statute took place in the State of New Mexico, within Dona Ana County on or about August 17, 1992. Plaintiff's argument to the trial court, prior to the charges against her being dismissed, and again here in this Court, is that the State of New Mexico lacked jurisdiction over her because an essential element of the crime (i.e., either the taking of the two children or the failing to return the two children) did not take place in New Mexico. It is undisputed that neither Plaintiff nor the two children were in the State of New Mexico at any time on or about August 17, 1992.

Defendant Kling is Entitled to Absolute Immunity

Defendant's first basis for summary judgment is that he is entitled to absolute immunity from suit for damages because he was acting at the direction of District Attorney Driggers in swearing out the criminal complaint for the arrest of Plaintiff and was, therefore, performing the function of a prosecutor in initiating and pursuing a criminal prosecution for the state.

Government prosecutors enjoy absolute immunity from suit under 42 U.S.C. § 1983 for monetary relief where the challenged conduct is intimately involved with the judicial proceeding. *Imbler v. Pachtman*, 424 U.S. 409

(1976). The purpose of this immunity is to protect prosecutors from the "serious danger that the decision to initiate proceedings will provoke a retaliatory response." *Id.* Thus, a prosecutor enjoys absolute immunity from damages under Section 1983 when he "initiat[es] a prosecution and . . . present[s] the State's case." *Id.* at 431. However, such immunity does not extend to actions of a non-prosecutorial nature, such as purely investigative, advisory or administrative tasks. *See Burns v. Reed*, 500 U.S. 478 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982); *Snell v. Tunnel*, 920 F.2d 673, 686 (10th Cir. 1990).

The Supreme Court's absolute immunity cases illustrate the critical importance of an official's "function" in this inquiry. "[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988). "[A] functional approach to immunity requires that those performing like functions receive like immunity." *Snell v. Tunnell*, 920 F.2d 673, 690 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). Thus, the fact that Defendant was an investigator for the district attorney does not change the nature of the inquiry as to whether he is entitled to absolute immunity for swearing out a criminal complaint.

Plaintiff points to the Supreme Court's decision in *Malley v. Briggs*, 475 U.S. 335 (1986) as being dispositive. In *Malley*, a police officer sought absolute immunity from suit for his alleged wrongful conduct in applying for arrest warrants. Looking to the common law availability of immunity at the time of the passage of 42 U.S.C. § 1983, the Court concluded the police officer was entitled

only to the defense of qualified immunity. *Id.* at 340-341.[3] Thus, Plaintiff argues, Defendant, like the police officer in *Malley*, is not entitled to absolute immunity. However, I believe Plaintiff's reading of *Malley* is too expansive and ignores subsequent Supreme Court decisions.

Malley dealt with the situation of an independent police officer seeking a judicial determination of probable cause for the issuance of arrest warrants. The facts of this case are distinguishable. First, Defendant was not a police officer capable of depriving people of valuable rights. *See Atkins v. Lanning*, 556 F.2d 485, 488-489 (10th Cir. 1977). Instead, he worked directly for the district attorney. In addition, the undisputed facts disclose that Driggers made the determination, after his initial discussion with Mr. Valentine and his review of New Mexico's Custodial Interference statute, that if the information relayed to him was verified, probable cause for the arrest of Plaintiff existed. Defendant investigated and verified the information originally presented to Driggers and helped prepare a criminal complaint. The criminal complaint was then approved by Chief Deputy District Attorney Perez. Thus, at the time Defendant swore out the criminal complaint before the magistrate judge, District Attorney Driggers had already determined that probable cause existed for Plaintiff's arrest.

In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993), the Court concluded that in determining whether prosecutors

---

[3] In 1871, "one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.*

were entitled to absolute immunity, the question was whether they were functioning as advocates for the state. *Id.* at 2616. The Court held that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* Here, District Attorney Driggers concluded probable cause for Plaintiff's arrest existed and directed Defendant to swear out a criminal complaint in support of that conclusion. Thus, I conclude that in seeking an arrest warrant in this case, at the request of District Attorney Driggers, Defendant was functionally initiating a criminal prosecution, an act for which he is entitled to absolute immunity from suit under 42 U.S.C. § 1983. *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).

Even were I to conclude that Defendant was not entitled to absolute immunity, the undisputed material facts disclose that he is entitled to the defense of qualified immunity.

Defendant Kling is Entitled to Qualified Immunity

In evaluating the defense of qualified immunity, the Court must compare the "objective reasonableness" of the conduct complained of with the state of the law at the time of the alleged violation. *Harlow*, 457 U.S. at 818. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* for plaintiffs to defeat a claim of qualified immunity, the "contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Once a defendant raises the defense of qualified immunity, the plaintiffs must "come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). The defendant prevails unless such a showing is made on both elements. *Harlow*, 457 U.S. at 819.

Under the facts of this case, Defendant is alleged to have made material omissions or misrepresentations as to information he supplied in swearing out a criminal complaint against Plaintiff. In *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991), the court held that the law was, at that time, clearly established that the omission of material information from an arrest affidavit violated the Fourth Amendment. *Id.* at 1139. The court further held that if a police officer makes a false statement or omission knowingly or intentionally, or with reckless disregard for the truth in an affidavit for a warrant, then the false statement or omission must be disregarded in deciding whether the affidavit demonstrates probable cause. *Id.*

Thus, in order for Plaintiff to overcome Defendant's assertion of qualified immunity, Plaintiff must demonstrate a genuine issue of material fact as to each of the following for each alleged omission or misrepresentation of fact:

1. There was a misrepresentation or omission in Kling's affidavit or criminal complaint;

2. The misrepresentation or omission was material to the determination by the magistrate of probable cause; and

3. That Kling knowingly, intentionally, or with reckless disregard for the truth made the misrepresentation or omission.

Plaintiff points to three separate omissions or misrepresentations:

1. Kling represented that the crime allegedly committed by the plaintiff (custodial interference) occurred within the state of New Mexico, Dona Ana County.

2. Kling failed to disclose that the plaintiff was not in New Mexico on August 17, 1992, or that Plaintiff picked the children up in El Paso, Texas, on July 9, 1992.

3. Kling failed to state that there was a dispute as to when the children were to be returned – August 17 (Mr. Robert's position) or August 20 (Plaintiff's position).

Plaintiff contends that at the very least, there exists a genuine issue of material fact as to whether Defendant acted with deliberate indifference for the truth in making the above omissions and misrepresentations.

Defendant asserts that the above omissions or misrepresentations are either not material to the determination of probable cause, were not omissions or misrepresentations, or it was reasonable for Defendant to make the challenged statements:

1. Kling's statement in the criminal complaint that Plaintiff committed the offense in Dona Ana County on or about August 17, 1992

is, according to Defendant, a statement regarding his belief as to jurisdiction and the time the offense was committed. Defendant argues this was not a statement of fact and that he can be denied the defense of qualified immunity only if "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that Dona Ana County had jurisdiction. Defendant argues that the law was not clearly established at the time Kling's affidavit was made that jurisdiction for the offense of custodial interference depended on Plaintiff either physically taking the children from the state of New Mexico, rather than having the children delivered to a hotel room in El Paso, Texas, or having been physically in the State of New Mexico at the time Plaintiff failed to return the children to her ex-husband. Defendant states that his belief that Dona Ana County had jurisdiction was objectively reasonable, particularly when it took the court and the attorneys involved over five months to determine that jurisdiction was even at issue.

2. Defendant argues that although neither the affidavit nor the criminal complaint specifically disclose the location of Plaintiff on August 17, 1992, it can be inferred from the information in the documents that Plaintiff was not in the State of New Mexico. Therefore, Defendant challenges whether there has been any omission. Further, Defendant asserts that whether Plaintiff was in New Mexico on August 17 is immaterial as presence in New Mexico at the time the children were to be returned is not required under the statute.

> 3. Defendant contends that the affidavit does disclose that there was a dispute surrounding the date when the children were to be returned, in that Plaintiff told her ex-husband that she would return the children on August 20. Further, the complaint was sworn out on August 21. The dispute surrounding the date is whether the children were to be returned on the 17th or by the 20th. The difference would have had no impact on the magistrate's finding of probable cause.

I address Plaintiff's first two allegations of material omissions or misrepresentations in the criminal complaint simultaneously because they are, in reality, the same issue. I conclude that Defendant did not fail to disclose to the magistrate that Plaintiff was not in the State of New Mexico "on or about" August 17, 1992. The Statement of Facts prepared and sworn to by Defendant clearly disclosed that Plaintiff was in Oregon on August 16, 1992, and subsequently fled her last known address, with the two children, by August 21, 1992. Although her location on or about August 17, 1992, was not specified in the Statement of Facts in Support of Criminal Complaint, I find the record clearly discloses Plaintiff was not in New Mexico on or about that date. Further, I conclude that the statement in the criminal complaint that "on or about the 17th day of August, 1992, in the County of Dona Ana, State of New Mexico, the defendant did . . . " is jurisdictional, not factual. The criminal complaint alleged a violation of New Mexico's Custodial Interference statute for Plaintiff's *failure to return* the children. Thus, I construe Plaintiff's challenge to be directed at the propriety of

Defendant's actions in making the "misrepresentation" that Dona Ana County had jurisdiction.

The Court in *Malley* concluded that a police officer was *per se* qualifiedly immune from suit where a magistrate acts mistakenly in issuing an arrest warrant but within the range of professional competence of a magistrate. *Malley*, 475 U.S. at 346 n.9. I conclude that the magistrate had the information before him to reasonably determine that Plaintiff was not in the State of New Mexico on or about August 17, 1992. As a result, I also conclude that the magistrate made a probable cause determination within his range of professional competence. Therefore, I must determine whether an officer of reasonable professional competence would, nonetheless, have requested the warrant under these circumstances. *Id.*

Contrary to Plaintiff's assertions, I believe Defendant acted as a reasonably competent officer in seeking a warrant for Plaintiff's arrest. At the outset, it must be made clear that this case does not present the situation where an officer fails to disclose material and potentially exculpatory information to the magistrate. Instead, Plaintiff contends that a criminal investigator for the District Attorney acted unreasonably in asserting that New Mexico had jurisdiction, even though a Magistrate, District Attorney Driggers, and Chief Deputy District Attorney Perez all concluded such jurisdiction existed. Indeed, the District Attorney appealed the dismissal of the case with full knowledge of the fact that Plaintiff was not in New Mexico at any time on or about August 17, 1992. No material information was withheld by Defendant from

the magistrate. Given the technical nature of the jurisdictional inquiry, I cannot conclude that Defendant Kling acted unreasonably in seeking a warrant for Plaintiff's arrest. Obviously, if lawyers and judges can disagree on this issue, officers of reasonable competence could as well. *Id.* at 341.

Similarly, based on the facts before me it is undisputed that Defendant did not make a material factual omission or misrepresentation in failing to specifically point out in his Statement of Facts that a disagreement between Plaintiff and Mr. Roberts existed as to the date the children were to be returned to New Mexico. First, that information could be inferred from the Statement of Facts. Second, the dispute was, and continues to be, irrelevant to the determination of whether probable cause existed that the offense in question had been committed. It is undisputed that the criminal complaint was sworn out on August 21, 1992, using the language that "on or about August 17, 1992" an offense had been committed. Plaintiff's side of the dispute was that she was to return the children to New Mexico by August 20, 1992. Even if this had been more forcefully articulated to the magistrate, the determination of probable cause would not have been affected.

For the above reasons, Defendant Kling is entitled to qualified immunity for his actions in signing and filing the Criminal Complaint and the Statement of Facts in Support of the Criminal Complaint. Plaintiff cites no factual support that Defendant intentionally filed a criminal complaint knowing that New Mexico lacked jurisdiction over Plaintiff, and I conclude that Defendant's actions were not objectively unreasonable.

Because of my resolution of the issue of Defendant's swearing out a criminal complaint in Dona Ana County, Plaintiff's other claims must fail as well. First, Plaintiff's claim based on the filing by FBI Agent Lacey of federal charges of unlawful flight to avoid prosecution lacks any factual support. Defendant did not file these federal charges. It is undisputed that District Attorney Driggers contacted the FBI and asked that federal charges be initiated against Plaintiff. Given my decision that Defendant did not act unreasonably in seeking an arrest warrant for Plaintiff in New Mexico, he cannot now be liable for supplying Agent Lacey with the same information he previously supplied to the magistrate. Similarly, Defendant cannot be liable for supplying this same public information to the media.

Accordingly, Defendant's Motion for Summary Judgment should be granted. An order in accordance with this memorandum opinion shall be entered.

/s/ Leroy Hansen
UNITED STATES
DISTRICT JUDGE

For Plaintiff: William L. Lutz
Martin, Lutz & Brower, P.C.
Las Cruces, New Mexico

For Defendant: Maha Khoury
NM Legal Bureau/RMD
Santa Fe, New Mexico

No. 96-1602

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID C. IGLESIAS
Director, Legal Bureau
State of New Mexico Risk Management Division
1100 St. Francis Drive
P.O. Drawer 26110
Santa Fe, New Mexico 87502-6110
(505) 827-2202

MARK D. JARMIE
Counsel of Record
SHARP, JARMIE & SCHOLL, P.A.
Attorneys for Respondent
500 Marquette, N.W.
Suite 1360
Albuquerque, New Mexico 87102
(505) 842-5050

71257 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

TABLE OF CONTENTS

	Page
Introduction	1
Statement of the Case	1
Reasons for Denying the Writ	4
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)	6, 7
Burns v. Reed, 500 U.S. 478 (1991)	5
Ehrlich v. Giuliani, 910 F.2d 1220 (4th Cir. 1990)	5
Forrester v. White, 484 U.S. 219 (1988)	4
Imbler v. Pachtman, 424 U.S. 409 (1976)	4, 5, 8
Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986)	5
Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983)	5
Mailey v. Briggs, 475 U.S. 335 (1986)	6, 7
Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992)	4
Pinaud v. Suffolk, 52 F.3d 1139 (2d Cir. 1995)	5

Contents

	Page
Roberts v. Kling, 104 F.3d 316 (10th Cir. 1997)	4, 5
Schnecker v. City of Sioux City, 107 F.3d 662 (8th Cir. 1997)	5

Statute Cited:

42 U.S.C. § 1983	3, 4

RESPONSE TO PETITION FOR CERTIORARI

The Respondent, Charles Timothy Kling, respectfully prays that the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 6, 1997, be denied.

INTRODUCTION

For the purposes of responding to this Petition, Respondent does not challenge the statements of jurisdiction, constitutional provision involved, or the basis for jurisdiction below made in the Petition for Writ of Certiorari. Respondent does, however, submit a separate statement of facts relevant to the issues presented for review and a statement of the reasons why the writ should not be granted in support of this response.

STATEMENT OF THE CASE

On August 21, 1991, Las Cruces, New Mexico attorney Jerald A. Valentine telephoned the local District Attorney, Douglas Driggers, regarding a case of potential criminal custodial interference. Mr. Valentine told District Attorney Driggers that he represented Ronald Roberts, the father of two minor children over whom Mr. Roberts had primary physical custody. Mr. Roberts and his sons lived in Las Cruces, Dona Ana County, New Mexico. Petitioner Susan Lynn Roberts had rights of visitation, including six (6) weeks of summer visitation.

Mr. Valentine informed the District Attorney that in the summer of 1991, Petitioner requested that Mr. Roberts deliver the children to her in El Paso, Texas so she could take them with her back to her home in Oregon. El Paso adjoins Las Cruces, and houses the only major airport in the region. Mr. Roberts drove from Las Cruces to El Paso to deliver the children

only after agreeing with Petitioner that the children would be returned to him two days before they were to start school in Dona Ana County, New Mexico.

Shortly before school was to start, Petitioner told her ex-husband over the phone that she would not return the children to him as she had agreed and consistent with the court-ordered parenting plan. Mr. Roberts promptly reported that conversation to Mr. Valentine, who contacted Petitioner's attorney. After discussions with Petitioner, her attorney informed Mr. Valentine that the children would be returned to New Mexico on August 21, 1992, and relayed the flight information. Mr. Roberts met the designated flight, however, the children were not on the plane.

Mr. Roberts then contacted an Oregon attorney to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Petitioner. After attempted service of the warrant on August 21, 1992, the Oregon attorney informed Mr. Roberts that the deputy sheriff was told that Petitioner had left her home and had taken the children to Alaska.

After receiving all of this information from Mr. Valentine, District Attorney Driggers reviewed the essential elements set forth in the New Mexico custodial interference statute, and asked Mr. Valentine additional questions regarding the basis for his belief that a crime had been committed. He then told Mr. Valentine that he would send an investigator, Respondent Timothy Kling, to confirm certain factual allegations presented to him by Mr. Valentine. District Attorney Driggers believed that if Mr. Kling was able to verify Mr. Valentine's allegations, then probable cause existed to believe that the Petitioner had committed a crime.

Respondent Kling verified the specific information presented to District Attorney Driggers by Mr. Valentine. District Attorney Driggers then made the decision to prosecute the Petitioner. The criminal complaint was drafted and approved by Alfred J. Perez, the Chief Deputy District Attorney and signed by Respondent. The complaint was then taken to a local magistrate, who reviewed the complaint for legal sufficiency and approved the arrest warrant. Respondent then filed the charges at the direction of the district attorney and the chief deputy district attorney.

Petitioner was eventually arrested on November 24, 1992 pursuant to that warrant. At the time of her arrest, she had possession of the two children and had not had additional contact with Mr. Roberts. Petitioner was extradited to New Mexico, and a local judge found probable cause for the charges.

Five months later, in July, 1993, Petitioner's attorney filed a motion to dismiss based on lack of jurisdiction. There, for the first time, Petitioner argued that any actions which she had taken that were the subject matter of the criminal charges were not taken within the State of New Mexico. The district judge granted the motion to dismiss, and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Petitioner brought suit against Respondent Kling, alleging violation of her civil rights pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of New Mexico. That court entered summary judgment on behalf of Respondent Kling, finding that Respondent was entitled to both absolute and qualified immunity from suit under 42 U.S.C. § 1983. Petitioner Roberts appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the ruling of the district court, holding that Respondent was absolutely immune from suit. The Tenth Circuit, therefore, did not reach

the issue of qualified immunity raised as an alternative grounds for summary judment by the district court.

REASONS FOR DENYING THE WRIT

In a careful and reasoned opinion, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court for the District of New Mexico granting Respondent Kling absolute immunity. The Tenth Circuit's decision conforms to the well established law of this Court and is consistent with that of other courts of appeal. Consequently, there is no compelling necessity for this Court to grant certiorari so that the Tenth Circuit's decision can be reviewed.

The scope of absolute immunity is neither novel nor vague. This Court has directed lower courts to "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [to] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). As the Tenth Circuit noted in this case, absolute immunity "is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Roberts v. Kling*, 104 F.3d 316, 318 (10th Cir. 1997), quoting *Mee v. Ortega*, 967 F.2d 423, 425 (10th Cir. 1992).

This Court has never wavered from its holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976) that state prosecutors are entitled to absolute immunity from suits brought pursuant to 42 U.S.C. § 1983 for activities within the scope of their prosecutorial duties. *Id.* at 420. Incorporated within the broad ambit of prosecutorial duties entitled to absolute immunity are those activities that are "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution." *Id.* at 430-31.

This Court has distinguished between those acts which were purely investigatory from those which were intimately associated with the judicial phase of the criminal process. *Burns v. Reed,* 500 U.S. 478 (1991). Thus, the pre-prosecution interview of a witness by a prosecutor in an attempt to obtain information so that a probable cause determination might be made is likely not to be given absolute immunity. *See, e.g., Joseph v. Patterson,* 795 F.2d 549, 555 (6th Cir. 1986). However, acts such as filing of a criminal information or whether and when to prosecute are clearly entitled to absolute immunity. *Imbler v. Pachtman, supra,* 424 U.S. at 431, n. 33.

The Tenth Circuit, among others, has held that a prosecutor's seeking of an arrest warrant is an integral component of the decision to initiate a prosecution. *Roberts v. Kling, supra,* 104 F.3d at 320 (*quoting Lerwill v. Joslin,* 712 F.2d 435, 437 (10th Cir. 1983)); *Schnecker v. City of Sioux City,* 107 F.3d 662 (8th Cir. 1997); *Pinaud v. Suffolk,* 52 F.3d 1139, 1150 (2d Cir. 1995); *Ehrlich v. Giuliani,* 910 F.2d 1220, 1223 (4th Cir. 1990); *Joseph v. Patterson,* 795 F.2d 549 (6th Cir. 1986). The reasoning of those decisions is compelling when the nature of arrest warrants is considered. As the Tenth Circuit held in *Lerwill, supra,* "The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his 'initiation of a prosecution' under Imbler [*v. Pachtman,* 424 U.S. 409 (1976)]."

An arrest warrant approved by a prosecutor is not an investigatory tool. Nor is it the product of ill-considered whim or the caprice of a police officer. Inherently, a charging decision has been made by a prosecutor at the time such an arrest warrant has been issued. Consequently, the arrest warrant is an integral

component of initiating a prosecution. And even as the decision of whether or when prosecution should occur is entitled to absolute immunity, so is the decision of whether, when and how an arrest warrant should be requested.

The Tenth Circuit's opinion in this case is in concert with this Court's holding in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, this Court denied absolute immunity to a police officer who sought an arrest warrant following his investigation of the defendants. The fact that the petitioner in *Malley* was a police officer as is the Respondent herein is not relevant. A determination as to whether absolute immunity is warranted must be made by determining the function that the police officer's acts serve. The function of the officer's acts in *Malley* was to serve as the sole impetus for the investigation and arrest of the respondent. Indeed, the officer in *Malley* investigated the alleged criminal activity, prepared complaints and arrest warrants and then presented them to a judge for signature. No prosecutorial involvement in the decision to prosecute is indicated at any point prior to the arrest of the respondents in *Malley*.

In this case, the determination to charge Petitioner Roberts had already been made by the District Attorney, and the application for a search warrant formally approved by the Chief Deputy District Attorney. The function of Respondent Kling's affidavit was merely to implement the determination to prosecute Mr. Kling that had already been made by the District Attorney.

Focus on the function of Respondent Kling's acts, rather than on the power of the actor or the actual act itself is completely consistent with this Court's rulings in *Malley, supra* and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). In *Buckley*, this Court considered the claim that prosecutors had fabricated evidence in order to support a prosecution. This Court concluded that

the prosecutors' acts in endeavoring to find out whether certain bootprints had been made by the plaintiff were made as investigators looking for clues and corroboration that might give them probable cause to arrest, and denied the prosecutors absolute immunity.

In *Buckley,* as in *Malley,* the Court's rulings hinged not on the actors involved nor their specific acts, but upon the function of the acts themselves. Thus in *Buckley,* the Court's opinion did not concentrate on the distinction between a prosecutor or police officer, but rather on the functions of the prosecutor's acts. This Court found the prosecutor's acts in *Buckley* to be "entirely investigative in character." *Id.* at 274. The Court distinguished those investigative acts from the acts of an advocate by stating that "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.*

In this case, there is no dispute that District Attorney Driggers and Chief Deputy District Attorney Perez had made a probable cause determination prior to ordering Respondent Kling to seek an arrest warrant. Their decision was consequently in their role as advocates rather than as investigators. The function of Respondent Kling's act of signing the arrest warrant he was instructed to obtain was to assist prosecutors acting in their role as advocates. As such, he is entitled to absolute immunity.

The Tenth Circuit's holding in this case followed the well established, functional analysis dictated by this Court. Accordingly, the result which the Tenth Circuit obtained from that analysis is appropriate and consistent with law. The Tenth Circuit examined the function of Respondent Kling's acts. It found that any material act of Respondent Kling was performed after the complaint that established probable cause was signed

by the prosecutors. Consequently, the Tenth Circuit was able to determine, consistent with this Court's holdings, that the function of any acts of Kling was consistent with the prosecutor's roles as an advocate, and thus entitled to absolute immunity.

Petitioner seeks to have this Court reweigh the Tenth Circuit's evaluation of the function of Respondent Kling's acts. The ambit of the law related to absolute immunity is well settled and clear. There is no compelling interest of justice in having this Court reweigh the well reasoned and specific determination in a well settled area of law.

Protection of the absolute immunity accorded to the prosecutor's advocacy function is essential to the administration of justice. To diminish that protection would cause the public trust of the officer to suffer, since the prosecutor would be constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. *Imbler, supra*, 424 U.S. at 424. This Court has already weighed that balance, and determined that absolute immunity of prosecutors and their agents acting in the role of advocates, after probable cause has been determined, is appropriate and necessary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARK D. JARMIE
Counsel of Record
SHARP, JARMIE & SCHOLL, P.A.
Attorneys for Respondent
500 Marquette, N.W.
Suite 1360
Albuquerque, New Mexico 87102
(505) 842-5050

DAVID C. IGLESIAS
Director, Legal Bureau
State of New Mexico Risk Management Division
1100 St. Francis Drive
P.O. Drawer 26110
Santa Fe, New Mexico 87502-6110
(505) 827-2202